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Fidelis Daniel Enechukwu v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–13–01 OF 2013
MOHTARUDIN BAKI, TENGKU MAIMUN AND AHMADI ASNAWI JJCA
25 MARCH 2015

C

Criminal Procedure — Interpreter — Duty of court — Accused a Nigerian national — Trial judge refused request for Nigerian interpreter — Testimony of prosecution witnesses given in Bahasa Malaysia — Whether accused accorded fair trial — Criminal Procedure Code s 270

D

At the High Court, the appellant, a Nigerian, was convicted and sentenced to death for the offence of trafficking in dangerous drugs. During trial, the appellant's request for a Nigerian interpreter was refused by the trial judge. The concern of the trial judge was that the services of the Nigerian interpreter would have to be paid for by the court. Hence, in the present appeal, the appellant urged the trial court to provide an interpreter for the appellant on the ground that he was deprived of his fundamental right to a fair trial and contended that the matter be remitted for retrial. The prosecution, on the other hand, contended that there was no miscarriage of justice because the appellant understood English.

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Held, allowing the appeal:

(1) The appellant had been deprived of a fair trial when the evidence of the witnesses was not translated to him. Not all the evidence of the prosecution witnesses which were testified in Malay language, was translated to the appellant. There was a doubt as to whether the appellant actually understood the proceedings and of what the witnesses were testifying against him. The provisions of s 270 of the Criminal Procedure Code had been breached. The assistance of the interpreter was sought but was refused by the trial court. The concern of the trial judge, that the services of the Nigerian interpreter would have to be paid for by the court was an irrelevant consideration (see paras 12–13 & 15).

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[Bahasa Malaysia summary

I

Perayu, bangsa Nigeria di Mahkamah Tinggi disabitkan dan dijatuhkan hukuman mati bagi kesalahan mengedar dadah berbahaya. Semasa perbicaraan, permohonan perayu untuk jurubahasa berbangsa Nigeria ditolak oleh hakim perbicaraan. Perkara yang dipertimbangkan oleh hakim

perbicaraan adalah bahawa khidmat jurubahasa Nigeria akan dibayar oleh mahkamah. Maka, rayuan ini, perayu mendesak mahkamah untuk memperuntukkan jurubahasa bagi perayu atas alasan bahawa dia dinafikan dengan hak asasinya kepada perbicaraan yang adil dan berhujah bahawa perkara diremitkan untuk perbicaraan semula. Pihak pendakwaan, sebaliknya berhujah bahawa tidak terdapat ketidakadilan kerana perayu memahami Bahasa Inggeris.

Diputuskan, membenarkan rayuan:

(1) Perayu telah dinafikan dengan perbicaraan adil apabila keterangan saksi-saksi tidak diterjemahkan kepadanya. Tidak kesemua keterangan saksi-saksi pihak pendakwaan yang diberikan dalam Bahasa Melayu, diterjemahkan kepada perayu. Terdapat kesangsian mengenai sama ada perayu sebenarnya memahami prosiding tersebut dan mengenai apa yang saksi-saksi telah memberi keterangan terhadapnya. Peruntukan s 270 Kanun Tatacara Jenayah telah dilanggar. Bantuan jurubahasa dipohon tetapi ditolak oleh mahkamah perbicaraan. Perkara yang dipertimbangkan oleh hakim perbicaraan, bahawa khidmat jurubahasa Nigeria perlu dibayar oleh mahkamah adalah pertimbangan yang tidak relevan (lihat perenggan 12–13 & 15).]

Notes

For a case on duty of court, see 5(2) *Mallal's Digest* (5th Ed, 2015) para 2603.

Cases referred to

Ah Phoon & Ors v PP [2006] 5 CLJ 521, HC (refd)
Chitra Devi Suppiah v Timbaian Menteri Dalam Negeri, Malaysia & Ors [2011] 3 CLJ 557, HC (refd)
Kunnath v The State The Guardian 20 August 1993 (folld)
Mat Repin bin Mamat v PP [1994] 1 SLR 663, CA (refd)
R v Lee Kun (1915) 11 Cr App R 293; [1914–15] All ER Rep 603, CA (refd)

Legislation referred to

Criminal Procedure Code s 270

Appeal from: Criminal Trial No 45–12–04 of 2012 (High Court, Pulau Pinang)

Naran Singh (Naran Singh & Co) for the appellant.
Tetralina bt Ahmed Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was convicted and sentenced to death by the High Court at Penang for the offence of trafficking in dangerous drugs. Against the conviction and sentence, the appellant appealed to the Court of Appeal.

[2] There was only one ground of appeal canvassed before us, namely the failure of the trial court to provide an interpreter to the appellant.

[3] The appellant is a Nigerian. During the trial in the High Court, the appellant was represented by learned counsel, Mr Yagoo Subramaniam. After several prosecution witnesses testified, the defence counsel made a request that a Nigerian interpreter be provided to the appellant. The trial judge refused, as can be seen from the following (*Rekod Rayuan Jld*1 p 71):

P/B: I humbly request to this Court to provide an Interpreter to the accused

Mahkamah: No, he can understand English.

P/B: It's better for him.

Mahkamah: Mr Fidelis, where were you schooling and until what level?

OKT: At Nigeria. Secondary School.

Mahkamah: At Nigeria, all the Secondary School leavers are able to speak English, isn't it?

OKT: Yes.

P/B: It's better to appoint an interpreter for him.

Mahkamah: No, cannot. He can understand English. At the same time the Court interpreter will translate the evidence to him in English.

[4] Citing *Mat Repin bin Mamat v Public Prosecutor* [1994] 1 SLR 663; *Ah Phoon & Ors v Public Prosecutor* [2006] 5 CLJ 521 and *Chitra Devi Suppiah v Timbaian Menteri Dalam Negeri, Malaysia & Ors* [2011] 3 CLJ 557, learned counsel submitted that the appellant was deprived of his fundamental right of a fair trial and urged that the matter be remitted for retrial.

[5] For the prosecution, learned deputy public prosecutor submitted that there was no miscarriage of justice occasioned to the appellant as the appellant understood English. It was submitted by learned deputy that under s 270 of the Criminal Procedure Code ('the CPC'), there was no necessity to provide an interpreter of the mother tongue of the appellant. In submitting that the appellant understood the English language, learned deputy highlighted that:

(a) when the charge was read, the appellant understood the charge and elected to plead not guilty;

(b) the court interpreter translated the proceedings to the appellant;

(c) the appellant stated that he could speak English; and

(d) the appellant in fact gave evidence in English.

[6] It was contended by learned deputy that the appellant was not prejudiced as learned counsel could communicate and obtain instructions from the appellant and learned counsel was able to forward the defence at the early stage of the trial.

[7] We had allowed the appeal and ordered a retrial. We now provide the reasons for so deciding.

OUR DECISION

[8] We were concerned with whether the evidence given by the prosecution witnesses in the Malay language was interpreted to the appellant as required by s 270 of the CPC which provides:

> 270 Interpretation of evidence to accused.
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> (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.

[9] In *Mat Repin*, the appellant was convicted in the High Court for importing into Singapore not less than 1.026g of cannabis. The appellant hailed from Kelantan and could only speak and understand the Kelantanese dialect. Although a suitably qualified interpreter in the Kelantanese dialect was eventually provided for the appellant after ten witnesses had given evidence, the Singapore Court of Appeal upheld the conviction of the appellant. M Karthigesu JA said:

> 13. Section 209 and other provisions in the CPC as to interpreters are statutory safeguards to ensure that an accused is substantially able to comprehend the proceedings to enable him to best present his defence. The ability to understand the prosecution case against him will allow him to decide whether to give evidence himself, whether to call witnesses on his behalf or whether to instruct his counsel to rebut any particular piece of evidence given by the Prosecution.
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> 14. However, to that a caveat must be added. Notwithstanding that there has been non-compliance with s 209(1) or any provision requiring the accused's comprehension of the proceedings, an appellate court will only interfere if the accused has been prejudiced such that there has been a failure of justice ...
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> 15. One such failure of justice was occasioned in the recent Privy Council decision

of *Radhakrishnan Kunnath v The State* [1993] 1 WLR 1315 ...

16. The facts there were that Kunnath, an uneducated Indian peasant, was charged with drug trafficking. He claimed trial, and at his trial, which was conducted in English, he was represented by experienced counsel and an interpreter had translated the charges to Kunnath as well as his statement from the dock. The interpreter, however did not translate the evidence of the witnesses to Kunnath who stated that he had not understood what any of the witnesses had said. He was convicted and sentenced to death. His appeal to the Court of Criminal Appeal of Mauritius was dismissed as that court was of the view that, since neither Kunnath nor his counsel had demanded the right to a translation of the evidence, that right was 'lost for all time'. Kunnath appealed to the Privy Council.

17. Lord Jauncey, in delivering the judgment of the Board, held that it was an essential principle of criminal law that a trial for an indictable offence should be conducted in the presence of the accused and this meant not simply that there should be corporeal presence of the accused but that the accused, by reason of his presence should be able to understand the proceedings and decide what witnesses he wished to call, whether to give evidence, and if so, upon what matters. Since Kunnath had not understood the evidence, the trial was for all practical purposes conducted without his presence and he had been deprived of a fair trial. The Board accordingly quashed his conviction.

18. It is therefore the court's duty to ensure that the accused is able to substantially understand the evidence given in the proceedings. The right to an interpreter cannot be waived by an accused or his counsel or his counsel ...

[10] Whilst agreeing with the proposition of the law set out in *Kunnath*'s case, the Singapore Court of Appeal found that *Kunnath*'s case was at the extreme end of the spectrum. The Singapore court sustained the conviction in *Mat Repin* on the grounds there was nothing to suggest that the appellant had, in any way, been prejudiced by only partially understanding the witnesses who took the stand without the Kelantanese interpreter as those witnesses were formal witnesses whose evidence could not have merited any serious challenge by the accused through his counsel. The real contentious evidence was the evidence of Ms Helena Granroth of the Department of Scientific Services on the analysis of the plant material and in respect of her evidence, the court found:

22. ... we do not see how the appellant has been prejudiced by not understanding the evidence of the procedure she adopted as even a layman who could understand English would not have been any better equipped to challenge the intricacies of scientific procedures. In our view, there was nothing that the appellant could have added to his counsel's robust challenge of the scientific procedure, assuming that he had actually understood what Ms Granroth was saying. The real contentious evidence in the present case was the evidence of HCO Png and, especially, that of CO Lim, who alleged that the appellant had made certain incriminating confessions to them. By that time, however, the services of the Kelantanese interpreter had already been secured and the appellant was able to understand what was being said.

[11] With respect, we were inclined to follow the decision in *Kunnath*'s case. As stated by the Lord Chief Justice of England in *R v Lee Kun* (1915) 11 Cr App R 293; [1914–15] All ER Rep 603 which was quoted in *Mat Repin*:

> If (the accused) does not understand the English language, he cannot waive compliance with the rule that evidence must be translated; he cannot dispense with it by express or implied consent, and it matters not that no application is made by him for the assistance of an interpreter. It is for the court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure.

[12] It must be emphasised that in the instant appeal, the assistance of the interpreter was sought for, but was refused by the court.

[13] At the hearing of the appeal, we had the opportunity of viewing the recording of the proceedings (the CRT) in the High Court. We noted that the court interpreter had translated the charge and the opening speech to the appellant in English. However, we found that not all the evidence of the prosecution witnesses, who had testified in Malay language were translated to the appellant. We therefore had a doubt whether the appellant actually understood the proceedings and of what the witnesses were testifying against him. In this regard, we found that the provisions of s 270 of the CPC had been breached.

[14] We also found from the CRT that the learned trial judge was concerned that the services of the Nigerian interpreter will have to be paid for by the court, in our view, that was an irrelevant consideration.

[15] Further, we took note of the fact that in *Kunnath*, the appellant was represented by an experienced counsel, yet the Privy Council quashed the conviction on the ground that the appellant had been deprived of a fair trial when the evidence of the witnesses was not translated to him. In our view, the appellant in the instant appeal had similarly been deprived of a fair trial.

[16] Based on all the above, we were unanimous in our decision that in the interest of justice and fair trial, the appeal be allowed and the case be remitted to the High Court for retrial. We ordered accordingly.

Appeal allowed.

Reported by Afiq Mohamad